



## CASE LAW OF THE COURT OF JUSTICE OF EUROPEAN UNION ON UNFAIR CONTRACT TERMS DIRECTIVE: IMPLICATIONS ON ESTONIAN DOMESTIC LAW<sup>1</sup>

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**Abstract.** The present article analyses the relevant judgments of the CJEU and looks into whether Estonian legislation and the case law of the Estonian Supreme Court (Riigikohus) concerning standard terms are consistent with the interpretations given by the CJEU. The article does not investigate all aspects associated with the rules on standard terms but rather concentrates only on the procedural obligations of a national court in deciding upon the unfair nature of standard terms and the consequences of establishing the unfairness of standard terms. The article also enquires whether the Estonian legislation on the order for payment procedure is in line with the UCTD. The authors submit that Estonian law - both the rules on standard terms as well as the procedural rules - is generally consistent with the requirements set out by the CJEU. In most cases, the Estonian Supreme Court (Riigikohus) also follows the procedural standards created by the CJEU case law on UCTD. Nevertheless, the Estonian rules on order for payment procedure not in all aspects meet the CJEU standards set in the recent *Finanmadrid* case, as the Estonian procedural law does not allow the unfairness control of standard terms in the initial proceeding nor at the later enforcement stage. Therefore, the Estonian Code of Civil Procedure needs to be changed to bring it in line with the UCTD.

**Keywords:** consumer law, unfair contract terms directive, Estonia

### 1. Introduction

In Estonia, rules on standard terms have been set out in the Law of Obligations Act (LOA) (2001) (§§ 35 et seq.) and are based on the Unfair Contract Terms Directive (UCTD) (1993) of the European Union. According to the principle of interpretation in conformity with the directive, when interpreting the rules of domestic law based on a directive a national court is required to interpret them in the light of the objective pursued by the directive, (*Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter*, 2004) and in order to do so, follow *inter alia* the interpretation of the directive given by the Court of Justice of the European Union (CJEU).

In recent years, the CJEU has delivered a significant number of judgments concerning the interpretation of the Unfair Contract Terms Directive (UCTD) (Micklitz & Reich, 2014, p. 771): according to the information available on the EUR-Lex database, there are 35 pertinent judgments since 2010. This is exactly twice the number of judgments given in the period between the birth of this directive in 1993 and 2010. Quite a few of these judgments have implications for the domestic law also outside the framework of standard terms. Although conventionally it is for national courts, and not for the CJEU, to decide upon the unfairness of particular standard terms (*Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter*, 2004), the CJEU has gone into giving all the more concrete guidance on one or another of the concepts used in the directive and therefore also relevant for national contract law. Furthermore, the effects of these rulings have started to influence even the domestic civil and enforcement procedure law.

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The present article analyses the relevant judgments of the CJEU and looks into whether Estonian legislation and the case law of the Estonian Supreme Court (Riigikohus) concerning standard terms are consistent with the interpretations given by the CJEU. Nevertheless, the article does not investigate all aspects associated with the rules on standard terms but only the procedural obligations of a national court in deciding upon the unfair nature of standard terms and the consequences of establishing the unfairness of standard terms. The article also enquires whether the Estonian legislation on the order for payment procedure is in line with the UCTD.

## **2. The rights and obligations of a national court in assessing the unfair nature of standard terms**

### **2.1. Why and how has the UCTD and the related case law bearing on national procedural law?**

#### **2.1.1 The principle of procedural autonomy of the Member States**

According to the principle of procedural autonomy of the member states, national law on civil procedure does not generally fall into the competence of the European legislator and consequently the member states are free to draw up these rules at their own discretion (Ebers, 2010, p. 825; Rösler, 2012, pp. 236, 243). In other words: it is a matter for the Estonian and not for the EU legislator to determine which are the rules to be followed when adjudicating civil lawsuits in Estonia. In Estonian civil procedure, the rule of party initiative applies. Likewise, the CJEU has stressed in *van Schijndel* case the principle that civil courts have only a passive role (*van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, 1995). In Estonia a civil matter is adjudicated on the basis of the facts and petitions submitted by the parties, based on the claim (§ 5(1) of the Code of Civil Procedure (CCIP) (CCIP, 2006) and as a rule, the EU legislator is not empowered to interfere with this principle.

Nevertheless, it is shown below that the procedural autonomy of member states, i.e. the principle that EU law does not affect domestic procedural law, has not been absolute for some time already and there is an ever-growing need to take into account in the member states' civil procedure and even the enforcement procedure the limits set by EU law.

#### **2.1.2 The principles of equivalence and effectiveness**

Limitations to the principle of the procedural autonomy of the member states arise from the principles of equivalence and effectiveness developed by the CJEU (*van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, 1995). It is precisely because of these principles of EU law that the case law of the CJEU regarding the UCTD bears meaning for the Estonian civil procedure. Pursuant to the principle of equivalence, procedural rules that govern hearing matters, which aim to protect the rights enjoyed by individuals under EU law, may not be less favourable than those governing similar domestic actions. Following the principle of effectiveness, however, domestic procedural rules should not make it in practice impossible or excessively difficult to exercise the rights conferred by EU law. (*van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, 1995).

Particularly the latter principle of effectiveness imposes limitations upon national procedural autonomy: domestic procedural rules should not make it impossible or excessively difficult to apply protection granted to consumers by the UCTD. The UCTD seeks to (a) prevent a consumer from being bound by an unfair contract term (article 6 of the directive), and (b) ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers (article 7(1) of the directive). Pursuant to the principle of effectiveness, Estonian domestic provisions on civil procedure must not therefore render the achievement of these aims impossible or excessively difficult. Every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, the progress of the procedure and its special features before the various national bodies (*Asociación de Consumidores Independientes de Castilla y León*, 2013).

## 2.2. Court's obligation to establish the existence of a standard term

The CJEU held already in the year 2000 in *Oceano Grupo* that the possible unfairness of a standard term is a matter for the court to verify of its own motion (*Oceano Grupo Editorial SA v Quintero and Salvat Editores SA v Prades, Badillo, Berroane and Feliu*, 2000). For that purpose, it should nevertheless be clear that a standard term really exists: if the clause before it is not a standard term, the court has no duty to proceed of its own motion with the substantive examination.

Where it is necessary to decide whether a term is at all a standard term and thus a contractual term falling within the scope of §-s 35 et seq. of the LOA, a question first arises who has to furnish and prove the facts that form grounds for such decision. Namely, the court's duty to examine of its own motion the unfair nature of standard terms does not necessarily mean following the principle of investigation, i.e. that the court itself should establish the facts and gather evidence for such purpose. In standard lease, insurance or credit contracts, undertakings typically use pre-formulated standard terms and therefore it is obvious in most of these cases that the terms at issue are standard terms and have not been individually negotiated. Yet, it might not be so obvious in all cases, which gives rise to the question whether it is necessary to prove that the term at issue is indeed a standard term, and if so, who should furnish the proof.

The position adopted by the Estonian Supreme Court has varied over the years. Initially, both in case law and in legal writing the prevailing opinion was that the court must ascertain of its own motion whether a disputed term is a standard term or not (Varul, Kull, Kõve, Käerdi & Sein, 2016, pp. 221-223) (The judgment of the Civil Chamber of the Supreme Court of 30th of April 2007, no. 3-2-1-150-06, 2007, p 17; of 8th of May 2007, no. 3-2-1-45-07, 2007, p 11.). In 2007, the Supreme Court took the opposite view, holding that „the party asking the court to apply to a contractual term the rules on standard terms laid down in the LOA, is to furnish and prove the facts which serve as a ground for qualifying the contractual term as a standard term under § 35(1) of the LOA (The judgment of the Civil Chamber of the Supreme Court of 30th of April 2007, no. 3-2-1-150-06, 2007, p 17; of 8th of May 2007, no. 3-2-1-45-07, 2007, p 11).

The CJEU took a position on this issue in *Pénzügyi Lízing* (*VB Pénzügyi Lízing Zrt v Ferenc Schneider*, 2010), interfering once again with the principle of procedural autonomy of the member states. The Court held that „the national court must investigate of its own motion whether a term [...] in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive [93/13]“. That is to say, the court must in each particular case ascertain of its own motion whether the parties to a contract are a business and a consumer and whether a contract term is of the kind „which is drafted in advance for use in standard contracts or which the parties have not negotiated individually for some other reason, and which the party supplying the term uses with regard to the other party who is therefore not able to influence the content of the term“ (§ 35(1) of the LOA). It follows that the CJEU read the UCTD in a way that obliges national civil courts to adhere to the principle of investigation that is quite unfamiliar to them in many aspects (Sein & Saare, 2013, p. 21)<sup>3</sup>.

It is worth mentioning that regardless of the explanatory position of the CJEU the inconsistency in the views taken by the Supreme Court continued. So the Supreme Court concluded in Case 3-2-1-66-12 that the burden of proof as regards the existence of a standard term lies with the party who is asking the court to apply rules concerning standard terms (The judgment of the Civil Chamber of the Supreme Court of 6th of June 2012, no. 3-2-1-66-12, 2012, p 12), whereas only a week earlier the Court had stated that „at least in the context of guarantees for the so called standard loans (such as housing loans), credit agreements, collateral arrangements and mortgage agreements can generally be deemed to be concluded on standard terms. [...] The opposite is to be proved by the mortgagee“ (The judgment of the Civil Chamber of the Supreme Court of 29th of May 2012, no. 3-2-1-64-12, 2012, p 35).

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<sup>3</sup> According to the principle of investigation, the court must also collect evidence by itself, as necessary. In Estonia, the principle of investigation normally applies in hearing of civil matters on petition § 477(7) of the Code of Civil Procedure.

This inconsistency in approach could possibly be justified by the Court's recognition in the former case (The judgment of the Civil Chamber of the Supreme Court of 6th of June 2012, no. 3-2-1-66-12) that the natural person who entered into the collateral arrangement did so because of interest in the economic activity of a company related to that person (The judgment of the Civil Chamber of the Supreme Court of 6th of June 2012, no. 3-2-1-66-12, 2012, p 14). No clear statement revealing that the Supreme Court would not have considered the collateral arrangement at issue to be a consumer contract can be found in the judgment, though. Moreover, the second case (The judgment of the Civil Chamber of the Supreme Court of 29th of May 2012, no. 3-2-1-64-12) too, concerned a situation where an individual had guaranteed debts arising from the economic activities of a company over which that person essentially exercised control, and claims resulting from the corresponding surety contract were secured by a mortgage according to a collateral arrangement (The judgment of the Civil Chamber of the Supreme Court of 29th of May 2012, no. 3-2-1-64-12, p. 40). In other words, the varying views taken by the Supreme Court in these cases cannot be justified here because there is one set of rules 6th of June 2012 applicable to traders. It is clear that the principles stemming from the judgments of the CJEU are binding for Estonian courts only in matters concerning consumer contracts, yet nothing precludes the courts from applying the same principles to business-to-business contracts.

Subsequent decisions of the Supreme Court follow indeed the guidance given by the CJEU in *Pénzügyi Lízing*, affirming that it is for the court to analyse of its own motion whether a contract term can be deemed a standard term or not (The judgments of the Civil Chamber of the Supreme Court of 26th of November 2014, no. 3-2-1-112-14, p. 14, of 22nd of April 2015, no. 3-2-1-26-15, p. 9). If establishing facts is necessary for that purpose, the court must do this by itself according to the principle of investigation. Thus the court must collect evidence by itself, where appropriate, e.g. in order to determine whether the contract at issue is a consumer contract or not. Regarding the latter question, the Supreme Court has nevertheless pointed out that a natural person can be presumed to conclude or to have concluded a contract as a consumer (The judgment of the Civil Chamber of the Supreme Court of 10th of May 2016, no. 3-2-1-25-16, p. 12), i.e., the other party has to refute this presumption in case of a dispute.

### **2.3. The obligation of a court to assess of its own motion the unfairness of a standard term**

#### **2.3.1 Contentious proceedings**

According to the settled case law of both the CJEU (*Pannon GSM Zrt v Erzsébet Sustikné Győrfi*, 2009; *VB Pénzügyi Lízing Zrt v Ferenc Schneider*, 2010) and the Supreme Court (The judgments of the Civil Chamber of the Supreme Court of 18th of January 2006, no. 3-2-1-155-05, p. 19; of 12th of March 2008, no. 3-2-1-2-08, p. 13; of 17th of June 2008, no. 3-2-1-56-08, p. 13; of 23rd of March 2011, no. 3-2-1-2-11, p. 12; of 15th of November 2010, no. 3-2-1-100-10, p. 11; of 29th of May 2012, no. 3-2-1-64-12, p. 32; of 11th of February 2015, no. 3-2-1-150-14, p. 14) the court must assess of its own motion (*ex officio*) whether a particular standard term is unfair or not. From the viewpoint of Estonian law, this is a matter of applying law, which is a task that the court performs regardless of the parties' pleadings (the so-called *iura novit curia* principle) (Heinze, 2008, pp. 663-664)<sup>4</sup>. The court is obliged to assess the possible unfairness of a standard term also in rendering judgments by default.

Yet another question is, whether in a situation where it is necessary to establish the facts in order to rule on the unfairness of a standard term, the court is indeed obliged to do so of its own motion, that is, to act on the principle of investigation that is not intrinsically characteristic to the civil proceedings. The CJEU has not read the provisions of the directive as imposing such obligation. The CJEU held already in *Pannon* that „the national court is required to examine, of its own motion, the unfairness of a contractual term where “it has available to it the legal and factual elements necessary for that task“ (*Pannon GSM Zrt v Erzsébet Sustikné Győrfi*, 2009) and the same principle was repeated in *Case Banco Español de Crédito (Banco Español de Crédito SA v Joaquín Calderón Camino*, 2012). Thus, the UCTD requires a domestic court to apply the principle of investigation only in order to decide whether a contractual term at issue is a standard term or not. On the other hand, in cases where facts need to be established

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<sup>4</sup> In the German legal literature, this obligation has also been called the Pan-European principle of *iura novit curia*.

in order to rule on the unfairness of a standard term, EU law does not provide for applying the principle of investigation and domestic rules of procedure are to be followed (see, to that effect also Trstenjak, 2013, p. 472). This means that if domestic procedural law is based on the principle of party initiative, the court cannot collect evidence on its own and in that case ascertaining the unfair nature of standard terms depends largely upon domestic rules governing the burden of proof.

In Estonia, this question has been dealt with by the Supreme Court in case 3-2-1-12-14 where that court had to rule upon the unfair nature of a standard term in a natural gas sales agreement while the substantial examination of the contractual term at issue required expert knowledge about the properties of natural gas and the methods and practices for estimating its amounts. In that case the Supreme court acted on the principle of party initiative, rather than the principle of investigation, and divided the burden of proof between the parties as follows: „First, the second party has to substantiate (make it believable) that this term can be harmful to him (that is, it can entail unfavourable consequences not foreseen by law). After that, it is for the supplier of the term to provide evidence that the term at issue does not cause unfair harm to the other party. If expert knowledge is needed to assess a contractual term and the supplier of such term has provided evidence in support of allegations that the term is not unfairly harmful for the other party, the other party shall, in turn, provide evidence to prove to the contrary. Thus, where the supplier of the terms provides, for instance, an expert opinion affirming the supplier’s statement, the other party also shall, at least as a general rule, provide an expert opinion or to ask the court to order expert assessment.“ (The judgment of the Civil Chamber of the Supreme Court of 7th of April 2014, no. 3-2-1-12-14, p. 14). Such approach of the Supreme Court follows guidance from the CJEU in Case Banif Plus whereby the national court which has found of its own motion that a standard term is unfair is required to give the parties to the dispute opportunity to set out their views on that matter (Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai, 2013).

### **2.3.2 Expedited procedure for payment orders**

Establishing the unfairness of standard terms on the court’s motion rises a specific question in connection with the order for payment procedure: does the obligation of the court to assess the potential unfairness of standard terms equally apply to the order for payment procedure? The expedited procedure for payment orders is a sub-type of non-contentious proceedings and characterised by extreme formality: in this procedure, there is neither establishment of facts nor assessing the substantial justification of the claim and the authority hearing the application does not have any margin of discretion in deciding the case. The current Estonian law of civil procedure does not preclude making an order for payment to settle a claim arising from a term which is unfair and therefore invalid: § 481 of the Code of Civil Procedure (CCIP) does not include such a restriction and if the debtor does not file an objection to the proposal for payment within 15 days the court will make an order for payment (The judgment of the Civil Chamber of the Supreme Court of 21st of April 2015, no. 3-2-1-75-14, p. 74)<sup>5</sup> according to § 489(1) of the CCIP. This payment order is subject to immediate enforcement according to § 489(7) of the CCIP and the creditor can forward it to the bailiff (enforcement agent) for enforcement.

It is nevertheless necessary also in this matter to take into consideration EU law, and particularly the requirements under the UCTD. The CJEU ruled in Case Banco Español de Crédito that „Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, in *limine litis* or at any other stage during the proceedings, even though it already has the legal and factual elements necessary for that task available to it, whether a term relating to interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection“ (Banco Español de Crédito SA v Joaquín Calderón Camino, 2012).

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<sup>5</sup> More specifically, a payment order is made by an assistant judge or in an automated manner through the information system of the expedited procedure in matters of payment order, see § 489<sup>2</sup> of the CCIP. Constitutional Chamber of the Supreme Court did not take view on the constitutionality of this provision although several judges dissented and insisted on doing this.

Essentially, the CJEU held in the said case that if the judge before whom an application for an order for payment has been brought notices that a term in a contract is clearly unfair<sup>6</sup>, that judge should have the power to declare of its own motion and without any application from the consumer that the term is unfair and thus void, and refuse to issue the order for payment. The Court reasoned that otherwise it would be sufficient for businesses to merely initiate an order for payment procedure instead of an ordinary civil procedure in order to deprive consumers of the protection intended by the UCTD (*Banco Español de Crédito SA v Joaquín Calderón Camino*, 2012).

The CJEU, however, did not go so far as to impose an obligation on the national court to examine within the remit of the order for payment procedure the possible unfairness of standard terms. It can nevertheless be concluded from the said ruling that the domestic order for payment procedure is to be designed so that the national court would have the power to assess the unfairness of standard terms, if no supplementary facts need to be established for that purpose. This of course, only applies to order for payment procedure; in the ordinary proceedings the court is clearly obliged to assess the possible unfairness of standard terms.

The ruling given by the CJEU in the beginning of 2016 in *Case Finanmadrid* affirmed that this was not a stray thought of the Court (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016). The *Case Finanmadrid*, too, was based on a reference for preliminary ruling from a Spanish court. The dispute in the main proceedings concerned a loan of 30 000 euros which a consumer took from the Spanish company *Finanmadrid* and in respect of which three natural persons acted as guarantors. As the consumer failed to make instalments during three months, *Finanmadrid* terminated the loan contract early and lodged an application to open enforcement proceedings against the debtor and guarantors. Since the debtor and guarantors failed either to comply with the order for payment or to appear before the court, the *Secretario judicial* (see, “The profession of court registrar/Rechtspfleger,” 1998, p 7)<sup>7</sup> of the Spanish Court of First Instance closed the enforcement proceedings by a decision (decree) which is an enforceable procedural instrument under Spanish law and can be referred to the court for execution subject to creditor’s application. *Finanmadrid* then submitted the said decree to that Spanish Court of First Instance for enforcement (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016). The Spanish court of first instance referred the case to the CJEU for a preliminary ruling, including two essential questions as regards the compatibility of Spanish procedural law with the UCTD:

1) „Must Directive [93/13] be interpreted as precluding national legislation such as that currently governing the Spanish order for payment procedure (Articles 815 and 816 [of the] LEC [Law on civil procedure]), which does not mandatorily provide either for the examination of unfair terms or the intervention of the court, except when the *Secretario judicial* considers it expedient or the debtors lodge an objection, because that legislation hinders or prevents examination of their own motion by the courts of contracts which may contain unfair terms?“  
and

2) „Must Directive [93/13] be interpreted as precluding national legislation such as the Spanish law that does not permit a court to consider, of its own motion and [in] *limine litis*, during subsequent enforcement proceedings [relating to] an enforceable instrument (a reasoned decision issued by the *Secretario judicial* bringing the order for payment procedure to a close), whether the contract giving rise to the reasoned decision whose enforcement is sought contained unfair terms, because under national law the matter is *res judicata* (Articles 551 and 552 in conjunction with Article 816(2) of the LEC)?“ (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016).

The CJEU answered to these questions as follows: „Directive 93/13 precludes national legislation, such as that at issue in the main proceedings, which does not permit the court ruling on the enforcement of an order for payment to assess of its own motion whether a term in a contract concluded between a seller or supplier and a consumer is unfair, when the authority hearing the application for an order for payment does not have the power to make such an assessment.“ (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016). In other words, the CJEU took the view that national procedural rules which do not allow neither the court performing the order for payment

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<sup>6</sup> While the ruling of the CJEU in *Banco Español de Crédito* concerned only agreement on the rate of interest on late payment, it is obvious from the ruling in *Finanmadrid*, which will be analysed next that it is applicable to other standard terms as well.

<sup>7</sup> This legal institution is close to the Estonian assistant judge.

proceedings nor the court deciding upon enforcement of the order for payment to assess on its own motion the unfairness of a standard term, are not in compliance with the UCTD.

Analysis of the reasoning of the CJEU suggests that also the Estonian current system of order for payment procedure, characterised by extreme formalisation, is not compatible with EU law as regards consumer contracts (and in particular, consumer contracts concluded under standard terms). Looking at the CJEU judgment in *Finanmadrid* reveals that the Estonian system of expedited procedure in matters of payment order is largely similar to the Spanish procedural system or even more formalised and less enabling for judicial review. This applies both to ruling on application for order for payment and to the subsequent stage of enforcement of the order. As regards the Spanish order for payment procedure the CJEU states that the review performed by *Secretario judicial* during the proceedings concerning the application for an order for payment is restricted to checking the compliance with the formalities to which such an application is subject, in particular the accuracy of the amount of the debt claimed, whereas it does not fall within the powers of the *Secretario judicial* to assess the potentially unfair nature of a term in a contract on which the claim is based (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016). Exactly the same applies pursuant to Estonian law. §§ 481 and 482 of the CCIP provide for the review of only certain formal prerequisites: the court must check, inter alia, whether jurisdiction lies with Estonian courts according to § 70 of the CCIP, whether the claim at hand is based on a contract or not (§ 481(1)1 of the CCIP) and whether the amount of the claim is not in excess of 6400 euros (§ 481(2)2 of the CCIP). The law, however, does not enable to assess whether the claim for which the order for payment procedure was initiated is clearly unfounded. On this ground the debtor can only bring an appeal against a payment order already issued (§ 489(2) subsection (3) of the CCIP). In any case, the law in force in Estonia does not give to the court clear right to refrain from issuing an order for payment because the claim is based on a standard term, which is clearly unfair, and thus void (Kõve, 2012, p. 671)<sup>8</sup>.

It should be noted that as regards the stage of proceedings concerning the application for an order for payment Estonian law permits even less judicial intervention than Spanish law. Namely, a fresh amendment to Spanish law gives the court certain power to intervene in the proceedings concerning applications for order for payment: if the *Secretario judicial* observes that a standard term can potentially be unfair, he is required to notify the court of applications concerning consumer contracts, so that the court can review unfair terms (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016)<sup>9</sup>. As there is no such rule in the Estonian legislation on civil procedure, this aspect of Estonian procedural law is to be regarded even less consumer-friendly than the procedural law of Spain, which the CJEU declared incompatible with the UCTD.

The stage of enforcement of the order for payment in Estonian law cannot boast of better protection of the rights of consumers. Let us recall: in the *Finanmadrid* judgment the CJEU stated that „[s]uch effective protection of the rights under that directive can be guaranteed only provided that the national procedural system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether terms of the contract concerned are unfair“ (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016). To put it otherwise, according to the CJEU the consumer's rights flowing from the UCTD are protected only if the court is able to examine the potential unfairness of standard terms during either a) the order for payment proceedings or b) the enforcement of the order for payment. Under Spanish law the court hearing the enforcement of an order for payment cannot do this of its own motion (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016): the decision of the *Secretario judicial* closing the order for payment proceedings becomes *res judicata*, which makes it impossible to check the unfair terms at the stage of enforcement of an order (*Finanmadrid SA v Jesús Vicente Albán Zambrano and Others*, 2016). The same applies in Estonia: the order for payment is an enforceable instrument, which is not even enforced by the court like in Spain but is

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<sup>8</sup> The Supreme Court judge Villu Kõve considers the use of expedited procedure for payment order especially problematic in the case of compromises „where the usurious creditor often imposes upon the debtor who is a consumer unlawful terms which no one checks“.

<sup>9</sup> However, this amendment was adopted in Spain only in October 2015 in order to take account of the judgment in *Case Banco Español de Crédito*.

submitted directly to the bailiff. As in the Estonian enforcement procedure the principle of formalisation applies (The judgment of the Civil Chamber of the Supreme Court of 20th of November 2011, no. 3-2-1-138-13, p. 16), the bailiff neither cannot nor is allowed to review the content of an enforceable instrument, that is, whether the underlying claim is substantially founded. Thus Estonian law does not entitle the court to establish neither during the order for payment proceedings nor during the enforcement proceedings the unfairness of standard terms underlying the claim. Following the judgments of the CJEU in cases *Banco Español de Crédito* (see to that effect also, Sein, 2013, p. 40 and *Finanmadrid* this situation is not compatible with the provisions of the UCTD. The situation is spiced up with the fact that according to one study nearly 90% of the claims which become enforceable in the order for payment proceedings in Estonia have their origin namely in consumer contracts (Klimberg, 2012, p. 62).

It is arguable whether such incompatibility between the CCIP and EU law could be overcome by interpretation in conformity with the directive. This could apparently be feasible as regards unfairness of a late payment interest rate clause (The judgment of the Civil Chamber of the Supreme Court of 10th of May 2016, no. 3-2-1-25-16, p. 13)<sup>10</sup>, as pursuant to § 481 (2)1 and (2)2 of the CCIP, limited review is possible for collateral claims. The authors consider that the court would thus be entitled (but not obliged) to examine during order for payment proceedings whether the claim for interest is arising out of a late payment interest clause which is potentially unfair. Of course, this can be done by the court only if that interest clause (i.e. a contract containing such a clause) has been provided to it; the court does not have to investigate this on its own. In other cases, merely interpretation in conformity with the directive is not sufficient to resolve the conflict between the CCIP and EU law. The authors are of the opinion that the only way to achieve compatibility of the CCIP and the UCTD is to amend the CCIP – or alternatively, the Code of Enforcement Procedure, if it would be desired to shift the review of standard terms to the stage of enforcement, – to enable the court to check the existence of potentially unfair standard terms in consumer contracts and to refrain from issuing the payment order, if necessary.

#### **2.4. Requirements under EU law concerning domestic enforcement procedure: is Estonian law compatible with these requirements?**

Traditionally, the rules of enforcement procedure, including those governing proceedings for enforcement against immovable property have been in the exclusive competence of member states under the principle of procedural autonomy (Micklitz & Reich, 2014, p. 784-785)<sup>11</sup>. Surprisingly, EU law has started to influence even this domain, again through the UCTD and the principle of effectiveness. This was first observed in the judgment delivered in *Aziz* (*Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, 2013) where the CJEU had to assess the compatibility of Spanish enforcement proceedings with the objective of the UCTD. Mr Aziz, the claimant in the main proceedings, had concluded a loan agreement secured by a mortgage with the bank. Mr Aziz failed to make payments and the bank instituted enforcement proceedings before the court. Since Mr Aziz failed to appear, the court delivered judgment in default of appearance and enforcement was initiated in respect of Mr Aziz. Mr Aziz then applied to the court seeking the annulment of clause 15 (*Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, 2013)<sup>12</sup> of the mortgage loan agreement, on the ground that it was unfair and, accordingly, also of the enforcement proceedings. Under Spanish law, it was not possible for the court during judicial proceedings concerning annulment of such standard term to stay enforcement and thereby avoid vesting of the consumer's family home: even if the judicial proceedings results in annulment of the standard condition on which the enforcement is based that would entitle the consumer later only to damages (*Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, 2013).

<sup>10</sup> In a recent judgment, the Supreme Court declared unfairly harmful and thereby invalid such consumer agreement on late payment interest rate in which the agreed interest rate exceeded three times the rate provided by law.

<sup>11</sup> As regards the procedural autonomy of the member states, see more in Micklitz & Reich, 2014, p. 784-785.

<sup>12</sup> That clause of the mortgage loan agreement stipulated not only that the bank had the right to bring enforcement proceedings to reclaim any debt but also that it could immediately quantify the amount due by submitting an appropriate certificate indicating that amount. In addition to that, clause the Spanish court regarded as potentially causing unfair harm several other clauses of the contract, such as the clause providing annual default interest of 18.75% (see pp 20 and 31 of the judgment).



In those circumstances, the Spanish court referred the case to the CJEU, wishing to know whether UCTD precludes national legislation which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a clause contained in a contract between a consumer and a seller or supplier, does not allow the court before which declaratory proceedings have been brought, to stay such enforcement proceedings. The CJEU answered this question in the affirmative. As assessed by the Court, Spanish law is incompatible with Article 7(1) of UCTD because, according to the principle of effectiveness, it does not enable to take adequate or effective measures of preventing the continued use of the disputed unfair contractual term (*Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, 2013). The CJEU concluded that Spanish procedural law runs contrary to the consumer law of the EU, and demonstrated once again that the procedural autonomy of the member states is significantly limited for reasons of EU law (Ebers, 2013, p. 345483)<sup>13</sup>. This view was later affirmed by the CJEU also in *Joined Cases Banco Popular Español SA and Banco de Valencia SA (Banco Popular Español SA v Quichimbo and Pérez and Banco de Valencia SA v Tortosa and Jaume)*, 2013).

It follows from the above that even the so-called sacred cow of domestic enforcement law is not immune from by EU law any more. This in turn gives rise to the question whether Estonian rules on enforcement procedure are compatible with the objective of the UCTD, or in other words, are in conformity with the directive. To give an answer to that question, it is first useful to analyse, whether an Estonian court can stay on any circumstances enforcement proceedings based on unfair standard terms.

In Estonia, enforcement proceedings against immovable property are often brought under a notarially authenticated agreement-prescribing obligation to be subject to immediate enforcement for the satisfaction of a claim. Such an agreement is an enforcement instrument according to § 2 (19) of the Code of Enforcement Procedure (CEP, Code of Enforcement Procedure, passed 20.04.2005, entry into force 01.01.2006. <https://www.riigiteataja.ee/en/eli/509022016013>). Enforcement thus often starts without a court decision to that effect and consequently, without any preceding review of the standard conditions contained in the credit contract underlying the debt. Yet, it is necessary, according to the CJEU, that effective means of staying enforcement procedure and „preventing the continued use of that unfair contractual term“ (*Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, 2013) were in place also in Estonian law. In the opinion of the authors, action for declaration of enforcement inadmissible, as provided in § 221 of the CEP, can be seen as such means. § 221 (1)1 of the CEP provides that in the case of compulsory execution, particularly in the case of the enforcement instruments such as a notarially authenticated agreement prescribing obligation to be subject to immediate enforcement, a debtor can also submit, in the action for declaration of enforcement to be inadmissible, all objections to the existence and validity of the claim arising from the enforcement instrument (So also the judgment of the Civil Chamber of the Supreme Court of 2nd of April 2014, no. 3-2-1-190-13, p 16). Thus the debtor can file an action until the end of the enforcement proceedings (§ 221(3) of the CEP), including for the reason that a claim on which enforcement is based arises from an unfair standard term, enabling enforcement to be deemed inadmissible. Action for declaration of enforcement to be inadmissible seeks to render unenforceable an enforcement instrument which is characterised by substantive dispute between the debtor and the claimant in respect of the claim documented in the enforcement instrument (The judgment of the Civil Chamber of the Supreme Court of 28th of September 2011, no. 3-2-1-60-11, p. 15).

According to Estonian law, filing an action for declaration of enforcement to be inadmissible is followed by ordinary judicial proceedings<sup>14</sup>. And what is especially important in light of Azizi: together with filing an action for declaration of enforcement inadmissible the claimant may also apply for measures for securing the action, including suspension of the enforcement proceedings, permitting the continuation of the enforcement proceedings only against a security, or revocation of the enforcement action according to § 378 (2) (6) of the CCIP. The court

<sup>13</sup> On the background and implications of the judgment in *Aziz* to Spanish law, see also (Sánchez, 2014, pp. 955-974).

<sup>14</sup> In filing an action for declaration of enforcement under a contract to be inadmissible the claimant must only substantiate (make it believable) that the respondent might not have a valid claim and then it is already for the respondent to prove having a claim against the claimant in the part in which the enforcement proceedings is sought. If the respondent is not able to bear the burden of proof, the action is to be uphold and the compulsory enforcement declared inadmissible.

may secure an action at the request of the claimant if there is reason to believe that failure to secure the action may render enforcement of a court judgment difficult or impossible (§ 377 (1) of the CCIP).

Therefore, the legal situation in Estonia differs from that of Spain as described in Azizi, by permitting suspension of the enforcement in relation to an immovable property or even revocation of enforcement actions on the ground that the enforcement is based on an unfair standard term. The Spanish law did not provide for such possibility and namely that was the root of CJEU's criticism against Spanish procedural law. In its recent decision in Kušionová the CJEU has considered sufficient the possibility provided in national law to commence enforcement without preceding judicial proceedings while enabling later stay of the enforcement proceedings arising out of an unfair contract term (*Monika Kušionová v SMART Capital a.s.*, 2014)<sup>15</sup>, just like provided in Estonian law. Thus in this respect Estonian legislation is in compliance with EU law, i.e. the UCTD, and there is no need to change our domestic rules governing enforcement procedure or to interpret these in conformity with the directive.

According to the view expressed by the CJEU, national courts that consider applying measures for securing an action, including suspension of enforcement proceedings under EU law, have to take into consideration that the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter<sup>16</sup>. In other words, when an Estonian court is deciding upon securing a consumer's action for declaration of enforcement to be inadmissible (i.e. upon suspending enforcement directed at the consumer's family home), that court must bear in mind that a consumer's right to accommodation is a right that has been given the status of fundamental right. In addition, looking at the pace at which the CJEU has recently been giving judgments on the compliance of national procedural rules with UCTD, it cannot be excluded that additional guidance and standards will follow in years to come.

### **3. Implications of establishing invalidity of standard terms**

#### **3.1. Prohibition of validity-directed interpretation and effects of the invalidity of a term on the contract as a whole**

In Estonian law, § 39 (2) of the LOA provides a clear rule that a standard term which is void shall not be interpreted such as to give it content by which the term is valid. This provision of Estonian law was inspired by § 306 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) (Varul, Kull, Kõve, Käerdi & Sein, 2016, pp. 221). The UCTD in itself does not contain any equivalent rule. Article 6(1) of the directive only provides for the member states' obligation to ensure that unfair terms shall not be binding on the consumer under their national law. This could give rise to a question about compatibility of § 39 (2) of the LOA with the directive.

The question whether a national court does have a right to essentially modify an unfair standard term such as to give it content by which the term is valid has been analysed by the CJEU in its judgment in C-618/10: *Banco Español de Crédito* (*Banco Español de Crédito SA v Joaquín Calderón Camino*, 2012). In this case the Spanish court asked, in essence, whether the UCTD precludes legislation of a member state, which allows a national court, in the case where it finds that a standard term in a contract is void, to modify that contract of its own motion by revising the content of that term. As an example, one could consider a situation where an agreement in the form of a standard term relating to interest on late payments is unfair: does the court have to delete that agreement from the contract or is it allowed just to reduce the rate of interest for late payment to a reasonable level? And does the answer to that question lie in EU law or is it a matter in which every member state can set out its own domestic rule?

In its judgment, the CJEU first directed national court's attention to the wording of article 6(1) of the UCTD, which expressly requires that an unfair standard term shall not be binding on the consumer (*Banco Español de Crédito SA v Joaquín Calderón Camino*, 2012). Secondly, the CJEU noted that it has been explicitly laid down in

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<sup>15</sup> The case concerned compliance of Slovak procedural law with the UCTD and the Charter of Fundamental Rights of the European Union.

<sup>16</sup> See for more in that regard in Sein, Lilleholt, 2014, pp. 26-28.

the second part of the sentence in Article 6(1) of the UCTD and in recital 21 in the preamble to that directive, that the contract will continue to bind the parties if it is capable of continuing in existence without the unfair provision (*Banco Español de Crédito SA v Joaquín Calderón Camino*, 2012). It thus follows from the above that national courts are required only to exclude the validity and application of an unfair standard term, without being authorised to complement or revise its content (*Banco Español de Crédito SA v Joaquín Calderón Camino*, 2012). Further, the CJEU noted that in the opposite case attainment of the objective of the UCTD would be compromised. To be more precise, this would eliminate the dissuasive effect of the directive on users of standard terms, because, even if a term was declared invalid in its initial form, it would nevertheless be valid in its modified form (*Banco Español de Crédito SA v Joaquín Calderón Camino*, 2012). Thus, the directive would have no dissuasive effect on users of standard terms in so far as to persuade them not to use unfair standard terms in contracts.

Substantially the same question was before the CJEU in Case C-488/11: *Asbeek* (Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV, 2013) in which the national court asked whether article 6(1) of the directive allows a national court, in the case where it has established that a penalty clause is unfair, merely to mitigate the amount of the penalty. The court was authorised to do so by the national (the Netherlands) law. The CJEU held also in that case that the national court is not authorised to modify a void term in a way that would make it valid, but is required merely to establish voidness of this standard term (Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV, 2013)<sup>17</sup>.

Thus the CJEU has repeatedly pointed out that a national court must not modify a void standard term in a contract such as to give it content by which the term would not be any more causing unfair harm and could continue to be valid in its revised form as part of the contract. In other words, the Court found that validity-directed interpretation is prohibited under UCTD and this is a matter falling outside the competence of the member states.

It follows from the relevant case law of the CJEU that the first sentence of § 39(2) of the LOA is in compliance with the UCTD (Sein, 2013, p. 214). An example could be a situation where a standard term enables its supplier to impose an unreasonably high contractual penalty on a consumer. According to § 42(3)(5) of the LOA such standard term is invalid. At the same time § 158(1) of this Act provides that the injured party may claim payment of the contractual penalty only if this has been agreed in a contract. If the relevant standard term has been declared invalid, the supplier of the term can no longer rely on the agreement with the consumer regarding payment of the contractual penalty and is thereby deprived of any grounds to claim the penalty. The Supreme Court has legitimately followed similar reasoning in its recent judgment 3-2-1-25-16, stating that agreeing upon a disproportionately high late payment interest in standard terms entails invalidity of the agreement and enables to claim payment of the interest only in the amount and on the basis of assumptions provided by law (The judgment of the Civil Chamber of the Supreme Court of 10th of May 2016, no. 3-2-1-25-16, p. 13)<sup>18</sup>.

The consequences of invalidity of a standard term for the validity of a contract as a whole were analysed by the CJEU in Case *Kásler* cited above (*Kásler and Káslerné Rábai v OTP Jelzálogbank Zrt*, 2014). In that case the national court asked the CJEU essentially whether, in a situation in which a standard term has been declared void, the national court is not allowed to cure the invalidity of the term by substituting a supplementary provision of national law, even if the contract may not continue in existence after the deletion of the void standard term. Thereby the national court also wished to know whether article 6(1) of the UCTD precludes national law, which authorises the court to do so. This question is equally relevant in light of Estonian law, as the second sentence of § 41 of the LOA provides that if a standard term is void the provisions of law governing the type of contract concerned apply in lieu of such terms. Yet, cases in which the court is allowed to apply, instead of a void standard term, provisions

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<sup>17</sup> The same view has been expressed in a comment to the General part of the Law of Obligations Act, see Varul, Kull, Köve, Käerdi & Sein, 2016, p. 213.

<sup>18</sup> Furthermore, the Supreme Court pointed out on the same occasion that claiming the late payment interest in part does not mean that „an essentially unreasonable standard term which gives its supplier the right to, inter alia, collect interest on late payment, turns into a reasonable term if its supplier does not collect the interest or reduces it for some reason“.

of law governing the type of contract concerned, are not limited to situations in which the invalidity of a term would entail invalidity of the entire contract.

The national court decided to refer the questions for a preliminary ruling in light of the view expressed by the CJEU in *Banco Español de Crédito* whereby a national court should not revise the content of a void term so as to render the term valid (*Kásler and Káslerné Rábai v OTP Jelzálogbank Zrt*, 2014). In answer to the question referred for preliminary ruling in *Kásler* the CJEU stated that article 6(1) of the directive does not preclude a rule of national law enabling the national court to delete a void standard term in a contract and substitute for it an appropriate provision of national law when otherwise the contract would be void in its entirety (*Kásler and Káslerné Rábai v OTP Jelzálogbank Zrt*, 2014). After that the Court noted that in the circumstances of the case the substitution of a void term is consistent with the objective of article 6(1) of the directive, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them. The provision is not intended to annul all contracts containing unfair standard terms (*Kásler and Káslerné Rábai v OTP Jelzálogbank Zrt*, 2014; *Jana Pereničová Vladislav Perenič v SOS financ spol. s r. o.*, 2012). If every contract containing a void standard term was void, being unable to continue in existence without that void standard term, consumers might be exposed to particularly unfavourable consequences. They would need to pay back forthwith the outstanding balance of the loan under a void contract, which is often likely to be in excess of the consumer's financial capacities. As a result, consequences related to the voidness of a standard term would tend to penalise the consumer rather than the supplier of the standard term (*Kásler and Káslerné Rábai v OTP Jelzálogbank Zrt*, 2014).

In the light of the reasoning of the CJEU in *Kásler*, § 41 of the LOA cannot be regarded as inconsistent with the objective of the UCTD. It is clear from the judgments described above that, as a rule, voidness of a standard term should not render void the contract in its entirety, as this would expose the consumer to particularly unfavourable consequences. Prohibition to interpret a void standard term to render it valid is intended to prevent a situation in which the provisions of the UCTD would be deprived of their dissuasive effect on suppliers of the terms. This effect is not eliminated, though, if the provisions of law governing the type of contract concerned apply in lieu of the void term. Namely, as the CJEU has pointed out regarding the thirteenth recital in the preamble to the UCTD, the imperative provisions of domestic law are presumed not to contain unfair terms (*Kásler and Káslerné Rábai v OTP Jelzálogbank Zrt*, 2014). Thus, if statutory provisions are applied to a contract, balance between the rights and obligations of the parties under the contract is re-established. The dissuasive effect upon the supplier of the term is maintained in the possibility that in the case of certain standard conditions substitution for provisions of law governing the type of contract concerned is not possible. It follows that also § 41 of the LOA, which does not provide for the possibility to apply a relevant provision of law in lieu of a void standard term only in circumstances where the contract would otherwise be annulled in its entirety, should be regarded as consistent with the directive.

### **3.2. Effects of the invalidity of a standard term on other contracts which include the same term**

It is clear from the above that the unfair (or unfairly harmful) nature of a standard term entails invalidity of this term in a contract concluded between parties to the proceedings and in lieu of the void term statutory provisions governing the type of contract concerned should be applied under Estonian law. However, it is questionable whether acknowledgement by the court of the invalidity of a standard term is to produce any effects, according to the directive, on other consumers who were not parties to the particular judicial proceedings, and if so, which are these effects. The UCTD does not contain express provisions on this issue and no clear answer can be found in Estonian legislation, either.

The effect of the invalidity of a standard term on other contracts containing the same term has been analysed by the CJEU in *Case Invitel (Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt)*, 2012). In that case the national court asked for preliminary ruling on the compatibility with article 6(1) of the UCTD, read in conjunction with Article 7(1) and 7(2) thereof, of Hungarian legislation which provides that a declaration of the invalidity of an unfair term in an action brought in the public interest and on behalf of consumers by a consumer protection

association produces effects with regard to all consumers who have concluded a contract with the same seller or supplier which includes the same standard term. In the other leg of the question the court wished to know whether a term is to be declared invalid also in those contracts the parties to which did not participate in the particular proceedings, and whether national courts are required to acknowledge invalidity of their own motion also in contracts including the same term in the future.

The CJEU held in its answer that if a national court establishes in the circumstances described the invalidity of a standard term, a provision of national law in accordance with which the term is declared invalid in all contracts concluded with the supplier of this term, including with regard to those consumers who were not party to the judicial proceedings, is compatible with the directive (*Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, 2012). Also, the disputed term is to be declared invalid in contracts which consumers will conclude with the supplier of this term in the future, and the national court has to do this of its own motion (*Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, 2012). The court has further noted in the judgment that the UCTD does not seek to harmonise the consequences to be drawn from standard terms being found to be unfair in the context of actions brought in the public interest and on behalf of consumers by consumer protection associations. Article 7(1) of the directive nevertheless requires the member states to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers (*Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, 2012). For that purpose, interested persons or organisations should have a right under article 7(2) of the directive to take action before the courts or before competent administrative bodies in order to obtain a decision as to whether a standard term is invalid. The appropriate efficient means are, in the opinion of both the CJEU and the Advocate General, that standard terms which are declared to be unfair, such as the term at issue in the proceedings before the CJEU, are not binding on either the consumers who are parties to the actions or on those who have concluded with the supplier of the same term a contract which contains the standard term at issue (*Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, 2012)<sup>19</sup>. The described requirements of the directive are satisfied also by Hungarian legislation as analysed in Case *Invitel* (*Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, 2012). Next, the CJEU has pointed out that a national court which finds that a standard term is unfair is required under article 6(1) of the directive to draw all the consequences that follow under national law, to ensure that the consumer is not bound by that term, and the same applies to future consumer contracts containing the same standard term (*Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, 2012).

Thus, according to the judgment in Case *Invitel*, if finding as to the invalidity of a standard term is to have effect more widely than for the consumer who participated in the proceedings, a provision of national legislation which includes a particular consequence is essential. Such consequence does not derive from the directive in itself. It is nevertheless impossible to conclude with certainty from the ruling in *Invitel* whether the member states have obligation to provide in their national law a similar erga omnes effect of the invalidity of a standard term<sup>20</sup>. The existence of such obligation is referred to in paragraph 38 of the judgment, in which the CJEU has held that if a standard term is declared to be invalid in an action brought in the public interest and on behalf of consumers by consumer protection associations, this term is to be invalid also in contracts concluded between other consumers and suppliers of the term, in order to achieve the results sought by the directive. On the other hand, the Court has pointed out in the positions expressed in the conclusion of the judgment that the corresponding Hungarian legislation satisfies the requirements of the directive. This leaves open the possibility that also national legislation which provides for other consequences to follow from the invalidity of a term might in certain circumstances be consistent with the objective of the directive.

If to take the view that the member states are required to provide for the erga omnes effect of establishing the invalidity of a standard term in a proceedings initiated by a consumer protection association, it is necessary to make sure whether Estonian legislation, too, provides for consequences similar to those discussed in *Invitel*.

<sup>19</sup> The view was shared by Advocate General Trstenjak, see ECLI:EU:C:2012:242, p 51.

<sup>20</sup> In that regard different approaches exist in legal literature as well. See for example Kerisbilck, 2013, p. 1473; Micklitz & Kas, 2014, p. 17.

First, it should be noted that § 45(1) of the LOA provides, in compatibility with article 7(2) of the UCTD, that a person or body provided by law may, pursuant to the procedure provided by law, require that a party supplying an unfair standard term terminates application of the term. As regards to the person or body entitled to file this request, § 45(2) of the LOA provides that this can be, inter alia, a non-profit association whose objectives as specified in its articles of association include protection of the rights of undertakings or persons engaged in professional activities and who is actually able to protect these interests resulting from the organisation and financing of its activities. According to § 19(3)(1) of the Consumer Protection Act (CPA, Consumer Protection Act, 2015), consumer associations and federations of associations have also the right to demand through a court, in order to protect the collective interests of consumers, that the application of standard terms which cause unfair harm to consumers be refrained from. § 21(2)(8) of this Act provides for the competence of the Consumer Protection Board to demand through county courts prohibition of the application of standard terms which cause unfair harm to the collective interests of consumers. According to § 65(3) of that Act the Consumer Protection Board may file an action with a county court on behalf of the Republic of Estonia and require a trader to terminate the violation of the rights of consumers and refrain from such violation in accordance with the provisions of § 45 of the LOA.

According to an annotation to the LOA, when it is desired that the use of a standard term causing unfair harm be terminated in all contracts which include this term, rather than in one particular contract, § 45 of the LOA applies (Varul, Kull, Kõve, Käerdi & Sein, 2016, pp. 221-223). It follows that it is possible for the persons mentioned above, in accordance with the provisions of § 45 of the LOA, to demand before a court that application of the disputed standard term be terminated in all the contracts used by them. Consequently, also Estonian law guarantees for certain persons the right to take action before the courts in the general interests of the consumers and in order to obtain prohibition as to the application of an unfair standard term by the supplier of that term. For instance, a situation can be imagined where the Consumer Protection Board files an action with a county court to demand that the application of a certain standard term by an Estonian credit institution be prohibited in respect of all relevant contracts concluded by this institution with consumers. Such judgment which imposes an obligation to the supplier of a disputed standard term not to apply the term any more is applicable only to the supplier of this standard term as regards the contracts this particular institution concludes with consumers. So, if a court prohibits, for instance, Swedbank from applying a certain standard condition to contracts concluded with consumers, this judgment has no relevance to Danske Bank which may continue use of essentially the same term in contracts it concludes with consumers. Of course, the comparable standard term in the contracts of Danske Bank can also be deemed invalid as causing unfair harm, but this has to be established by the court in due consideration of all the circumstances related to the specific contract.

In Estonia, the issue of the effects of establishing the invalidity of a term for consumers who are parties to contracts including this term, concluded with the suppliers of the term, is governed by § 457(7) of the Code of Civil Procedure (CCIP). According to that provision, if a person applying a standard term violates a court judgment whereby termination of the application of the standard term is required, the standard term is deemed to be invalid if the other contracting party relies on the court judgment. This means that the court has no obligation to examine on its own motion the invalidity of such standard term<sup>21</sup>. Consequently, in some circumstances, a consumer to whom the standard term which has been declared invalid in the described proceedings is intended to be applied, could be deprived of the protection granted by the directive. This could be the case, for instance, when the consumer is not aware of the invalidity of the term and the supplier of the term nevertheless invokes this invalid term to sue the consumer. In that case, the consumer does not usually realise the opportunity to rely on the invalidity of the term, and neither is the court obliged under § 457 (7) of the CCIP to declare the term invalid of its own motion. Such effect runs contrary to the position adopted by the CJEU in *Invitel* from which it follows that under the circumstances, the court is nevertheless obliged to examine the validity of the standard term of its own motion, and the term is to be deemed invalid also as regards the consumers who conclude a contract including the invalid term, with the supplier of this standard term after the court's judgment (*Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, 2012).

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<sup>21</sup> See also comment on the analogous provision in German law in Micklitz, 2013, p 1.

According to § 443(2) of the CCIP a court may require in the conclusion of a court judgment that the user of the standard terms communicate the court judgment in the manner determined by the court or may determine an additional manner for communication of the judgment. This means, in essence, that the court which establishes the invalidity of a standard term has discretion to decide how to communicate the judgment. So, the court may, for instance, choose to oblige the supplier of the standard term to publish the judgment on its website, send it by e-mail to all consumers with whom the supplier has concluded contracts which include the invalid term, and/or make it available in any other means which the court considers appropriate. This should secure the consumers' right to receive information of the decisions which affect them directly and can be of great importance as a basis to enforce their rights. At the same time, the extent of providing information to consumers depends on the assessment of that need by the court hearing the case.

Consumers' interests are not protected under Estonian law in the extent conferred by the directive, as the obligation of finding the potential invalidity of standard terms has been put on consumers, with the outcome of court proceedings depending on that. For instance, there could be situations where one court has declared a particular term invalid, but another court, hearing an action filed against a consumer by a supplier of the term invoking on this particular term included in a contract, may refrain from taking a position on the validity of the standard term or rule differently from the court which gave the earlier judgment.

A legal provision comparable in substance to that of § 457(7) of the CCIP is found in the law of the Federal Republic of Germany, namely in § 11 of the Unterlassungsklagengesetz (UKlaG, Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen, In der Fassung der Bekanntmachung vom 27. August 2002, BGBl. I S. 3422, S. 4346). In German legal literature it has been found that following the judgment in *Invitel* this provision has become useless and should not be any more applied in disputes involving consumers (Micklitz, 2013, p 1). The authors of the present article are of the same opinion as regards § 457(7) of the CCIP.

#### **4. Summary**

In recent years, the CJEU has in its case law on the Unfair Contract Terms Directive increasingly interfered in the member states' civil procedure and, invoking the principle of effectiveness, even established certain minimum standards as regards national enforcement procedure. Estonian law and the case law of the Supreme Court are generally consistent with the requirements set out by the CJEU. Nevertheless, Estonian Code of Civil Procedure would need some changes to bring it in line with the UCTD.

First, it can be concluded from the judgments in cases *Banco Español de Crédito* and *Finanmadrid* that the current Estonian expedited procedure for payment order concerning consumer contracts is not compatible with EU law, including, in particular, the UCTD. Therefore, the rules set out in the Code of Civil Procedure on expedited procedure ought to be changed, in order to empower, but not oblige the court to establish in the order for payment procedure the unfair nature and the resulting invalidity of a standard term contained in a consumer contract, and to refrain from giving the respective order for payment. As regards collateral claims this result can be achieved, at least on some occasions, by interpretation in conformity with the directive.

Second, the ruling in Case *Invitel* suggests the need for amending § 457(7) of the CCIP so that the court would have obligation to annul of its own motion also standard terms that have been declared unfair in judicial proceedings initiated by the Consumer Protection Board or a consumers' association under § 45 of the Law of Obligation Act.

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